

HEIDELBERG SILVER MINING CO., INC.

IBLA 80-909

Decided September 16, 1981

Appeal from decision of the Montana State Office, Bureau of Land Management, declaring mining claims abandoned and void. M MC 30855 through M MC 30888.

Affirmed in part; vacated and remanded in part.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

2. Federal Land Policy and Management Act of 1976: Assessment Work

--Mining  
Claims:  
Tunnel Sites

The failure of a holder of a tunnel site claim which has been properly recorded under 43 U.S.C. § 1744(b) (1976) to file an annual notice of intention to hold a tunnel site claim is a curable defect and the tunnel site claim may not be deemed to have been abandoned absent a failure to comply with a notice of deficiency.

APPEARANCES: Orville B. Olson, Esq., Pasco, Washington, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE LEWIS

Heidelberg Silver Mining Company, Inc., appeals from the decision of July 29, 1980, wherein the Montana State Office, Bureau of Land Management (BLM), declared the mining claims M MC 30855 through M MC 30867 and M MC 30871 through M MC 30888 and tunnel site claims M MC 30868, M MC 30869, and M MC 30870 (listed in the appendix attached hereto) 1/ abandoned and void because appellant failed to file evidence of annual assessment work performed or a notice of intention to hold its mining claims within the time period required under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and 43 CFR 3833.2-1(a) and (d).

These mining and tunnel site claims were located on various dates from 1927 through 1970. The notices of location were filed with BLM on August 10, 1979. The affidavits for assessment work were received by BLM on October 29, 1979.

On appeal, appellant argues "it was only through inadvertence that the Notice of Intention to Hold, as indicated by the recording of the affidavits for the assessment year ending September 1, 1979, was not received in the BLM office until October 29, 1979." The claims have been relocated, according to appellant. For the Department not to accept a recording 7 days late as a "timely" filing, appellant asserts, "would constitute an arbitrary, unreasonable, and unwarranted confiscation of many years of effort and expense."

[1] 43 CFR 3833.2-1(a) provides:

(a) The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

The statutory and regulatory mining recordation requirements are mandatory and the Board has no authority to waive them. Lyman Mining Co., 54 IBLA 165 (1981); Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981). The affidavits for assessment work for or a notice of intent to hold the mining claims listed above were due on or before October 22, 1979. As they were not timely filed, we find that the mining claims are abandoned and void, and that BLM correctly so found. L. D. Lamoureux, 56 IBLA 298 (1981).

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1/ The tunnel site claims listed above appear to be all the tunnel site claims disposed of in the decision below. If the Appendix includes additional tunnel sites, they are to be treated herein in the same way the three named tunnel site claims are treated.

[2] However, as to Tunnel Site Number 1, Tunnel Site #2, and Meadows Tunnel Site #1 (M MC 30868 through M MC 30870 inclusive), the BLM decision is not correct. There is no statutory requirement for filing evidence of assessment work or notice of intent to hold for tunnel site claims. As was pointed out in Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981), FLPMA must be read as requiring only the filing of a notice of location for millsite and tunnel site claims. It is clear that the Department's regulations require a notice of intent to hold millsite and tunnel site claims, see 43 CFR 3833.2-1(d). Thus, in the case of tunnel site claims, filing a notice of intent to hold the claim is required not by statute but only by regulation. Where there is a failure to comply with a requirement imposed only by regulation (as opposed to statute), the deficiency is subject to curative action. Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981); Mrs. Otis Teafor, 56 IBLA 367 (1981). This Board has so held in the case of tunnel site claims. John R. Erickson, 57 IBLA 157 (1981).

A person who fails to comply only with the regulations is to be given notice of the defect and 30 days to comply. If compliance is not achieved within the allowed time, the tunnel site claim may be declared abandoned and void, in an appealable decision. Topaz Beryllium Co. v. United States, *supra*; Nelson C. Barry, 57 IBLA 268 (1981); Mrs. Otis Teafor, *supra*. Appellant satisfied the statutory requirements for the initial recordation of the unpatented tunnel site claim. Accordingly, we hold that upon failure of appellant, a tunnel site claimant, to file an annual notice of intent to hold, BLM should notify appellant, the owner of the claim, of this deficiency and afford the claimant a period of time within which to comply with the regulatory requirement. Should compliance not then occur, the tunnel site claim may properly be declared abandoned and void.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed insofar as it relates to the unpatented mining claims, and is vacated insofar as it relates to the unpatented tunnel site claims. The case is remanded for further action consistent with this opinion.

Anne Poindexter Lewis

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Administrative Judge

We concur:

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Bruce R. Harris  
Administrative Judge

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C. Randall Grant, Jr.  
Administrative Judge.

## APPENDIX

<u>Claim Name</u>	<u>Serial Number</u>
B U Z Z #1	M MC 30855
B U Z Z #2	M MC 30856
B U Z Z #3	M MC 30857
B U Z Z #4	M MC 30858
B U Z Z #5	M MC 30859
B U Z Z #6	M MC 30860
B U Z Z #7	M MC 30861
B U Z Z #8	M MC 30862
B U Z Z #10	M MC 30863
B U Z Z #11	M MC 30864
B U Z Z #12	M MC 30865
B U Z Z #13	M MC 30866
D U K E	M MC 30867
Tunnel Site Number 1	M MC 30868
Tunnel Site #2	M MC 30869
Meadows Tunnel Site #1	M MC 30870
Rock Lake	M MC 30871
Rock Lake No. 1	M MC 30872
Rock Lake #2	M MC 30873
Valley View No. 1	M MC 30874
Valley View No. 2	M MC 30875
Silver Dream	M MC 30881
Dorothy	M MC 30882
Tom	M MC 30883
Jim	M MC 30884
Ella	M MC 30885
Walters	M MC 30886
Biber	M MC 30887
Red Bear	M MC 30888

